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In The

Supreme Court of the United States

October Term, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

Petitioners,

v.

ROY AND KATHLEEN R. ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,

Respondents.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN AND JOHN DOE RYAN,

Petitioners,

v.

SINTRA, INC., KEITH H. HAMACK and PATTY I. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF THE CITY OF SEATTLE

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INTEREST OF AMICUS CURIAE

Amicus curiae, the City of Bellevue, Washington, is a general purpose municipal corporation located across Lake Washington from the City of Seattle. It is the fourth largest city in the State of Washington, with a population of approximately 85,000. It is organized and operates under Revised Code of Washington Chapter § 35A, the Optional Municipal Code, under which it has the " . . . broadest powers of local self government consistent with the Constitution of this state." Wash. Rev. Code 35A.01.010. Under Wash. Rev. Code Chapter 35A.63, Bellevue has comprehensive power to plan, zone and regulate land uses within its jurisdiction.

Amicus curiae Snohomish County is a municipal corporation and political subdivision of the State of Washington located directly north of the City of Seattle. It is the third largest county in the state, encompassing approximately 2098 square miles and containing approximately 484,000 residents. It is a home rule charter county organized under Article XI, § 4 of the Washington State Constitution. Under authority of state statute, Snohomish County enacts ordinances and other land use controls to regulate the physical development of the county. *See* Wash. Rev. Code Chapter 36.70.

As municipal corporations responsible for such land use functions, like all other cities, towns and counties within the state, Bellevue and Snohomish County are directly and adversely affected by the decisions of the Washington Supreme Court which are the subject of the City of Seattle's Petition for Writ of Certiorari in this matter. Seattle, Bellevue, Snohomish County and other

cities, towns and counties have a common interest in the outcome of this case.

SUMMARY OF ARGUMENT

1. The Washington Supreme Court's Test For Qualified Immunity Conflicts With This Court's Precedents, And Fails To Accord Recognition To The Attorney/Client Relationship.

Under the case law of the United States Supreme Court, local government officials are entitled to a qualified, or "good faith," immunity from liability for damages resulting from their official acts " . . . as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Local government officials should and, in fact, must rely on the advice of legal counsel to ascertain the legality of their proposed actions before taking those actions. *See, e.g.*, Wash. Rev. Code § 36.27.020(2). Where local government officials have sought such legal advice, and have been advised by their legal counsel that their proposed action is lawful, courts should, at the very least, engage in a strong presumption that such officials are entitled to qualified immunity. It is important to government and its officials that this court correct the Washington Supreme Court's misreading of this Court's cases and clarify that the fact that an official has sought and received official legal advice should be considered and given weight in determining whether qualified immunity applies. (Question Presented 3, Petition for Writ of Certiorari.)

2. The Washington Supreme Court's Substantive Due Process Test For Land Use Legislation Intrudes On The Legislative Power Of Local Government And Threatens To Create An Avalanche Of Litigation Over Local Land Use Regulations.

Robinson v. Seattle[1] and *Sintra, Inc. v. Seattle*[2] are the latest in a series of Washington Supreme Court cases in which that court, by adopting the "unduly oppressive" test as an additional test in determining whether substantive due process has been violated, has gone well beyond the standards established by this Court for review of legislation under the fourteenth amendment. This test allows the reviewing court to intrude into the legislative realm and, in effect, act as a quasi-legislative body. These cases create uncertainty as to the validity of numerous laws and regulations at all levels of government, and they invite a flood of litigation over legislation that is plainly valid under this Court's precedents. (Question Presented 1, Petition for Writ of Certiorari.)

ARGUMENT

1. The Washington Supreme Court's Test For Qualified Immunity Conflicts With This Court's Precedents, And Fails To Accord Recognition To The Attorney/Client Relationship.

The concept that public officials should be immune from liability for damages resulting from their official

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[1] 119 Wash. 2d 34, 830 P.2d 318 (1992)

[2] 119 Wash. 2d 1, 829 P.2d 765 (1992)

actions is of ancient lineage. The immunity of legislators from actions taken in session was established in England by the Bill of Rights of 1689 and became firmly established in American law through article I, section 6 of the United States Constitution. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Judicial immunity is even more venerable, tracing its origins at least to the reign of Edward III (1327-1377). The immunity of the third branch, the executive, was in medieval England very broad; crown officers acted on behalf of the King and "the King could do no wrong." However, this absolute immunity was apparently on the wane even as early as the reign of William and Mary (1689-1695) as the law saw the gradual development of the "good faith," or qualified, immunity doctrine. *Scheuer v. Rhodes*, 416 U.S. 232, 239 n. 4 (1974).

Qualified immunity for administrative officials remains alive and well in the United States today. Underlying the doctrine is recognition of a fundamental policy perhaps best captured in Justice Jackson's terse statement, later quoted in this passage from *Scheuer v. Rhodes*, 416 U.S. at 241:

> *"It is not a tort for government to govern." Dalehite v. United States*, 346 U.S. 15, 97 L.Ed 1427, 73 S.Ct. 956 (1953) (dissenting opinion). Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity – absolute or qualified – for their acts, is a recognition that they err. The concept of immunity assumes this and goes on to assume

> that it is better to risk some error and possible injury from such error than not to decide to act at all." (emphasis added)

The Supreme Court first concluded that the immunity doctrine applied to actions under 42 U.S.C. § 1983 in *Tenney v. Brandhove,* 341 U.S. 367 (1951), and has elaborated on the nature of that immunity in a series of cases since that time. In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the court rejected the prior dual test which considered both objective and subjective factors, eliminating the subjective test because, by nature, it injected questions of fact requiring resolution by a jury, precluding summary judgment and forcing a trial, and the concomitant time and expense, based on "bare allegations of malice." *Harlow,* 457 U.S. at 818. The court established the test as follows:

> We therefore hold the government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights a reasonable person would have known.

Harlow, 457 U.S. at 818.

The court went on to comment that:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate a subsequent legal development, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Harlow, 457 U.S. at 818.

The question, of course, that most often faces the government official is: How am I to know whether the law is

clearly established? It cannot be unreasonable for that official to turn to his legal counsel for advice. Land use regulation has become increasingly complex in recent years with the advent of ever more sophisticated laws designed to regulate growth and limit environmental degradation. Increasingly, land use regulations have become the subject of litigation. Lower courts regularly rule on challenges to land use regulations and their implementation. The implications of particular lower court rulings and their application to other parties or circumstances are often uncertain and complex. In this environment, legal advice has played an ever more important role. Government officials, as laypersons in the law, have no choice but to turn to their legal advisors when such legal issues arise. They should be allowed to rely on the legal advice of those lawyers who serve in an official capacity to advise them. *See, e.g.*, Wash. Rev. Code § 36.27.020(2) (county prosecutor to be legal advisor to all county officers in all matters relating to official business).

In this case, the question facing the officials responsible for administration of Seattle's Housing Preservation Ordinance was highly technical: did a trial court ruling invalidating the ordinance in a specific case prevent enforcement of the ordinance against non-parties to the case? The officials were thus faced with a pure legal question which, as non-lawyers, they had no expertise to resolve. If the trial court rulings did not bar all enforcement of the HPO, then city officials had a *duty* to enforce it. The Washington Supreme Court found that the officials had actual knowledge of the court rulings, and therefore "knowingly" violated the law by continued enforcement of the ordinance. *Robinson v. Seattle*, 119 Wash.2d at 67-68,

830 P.2d 318 (1992). What the court ignores is that, particularly for government officials who are not lawyers, actual knowledge of the existence of a court ruling is not the equivalent of knowledge of the meaning, scope and extent of the ruling[3]. They can learn that only through advice of legal counsel. They had no choice but to rely on the legal advice provided by their attorneys. Their only other choice would have been to refuse to enforce the ordinance, in which case they well could have been accused of disregarding their legally mandated responsibilities. If local government officials, in circumstances like those present here, cannot rely on the advice of their attorney, they may be inhibited from enforcing important laws and regulations by the mere assertion that a single trial court ruling casts doubt on their validity. In short, the effect would be to " . . . unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton,* 483 U.S. at 638. Only if they can act with assurance that they can rely on the advice of their expert advisors can public officials be expected to act with the vigor and evenhandedness that sound public policy requires. Yet the Washington Supreme Court held in *Robinson v. Seattle,* 119 Wash.2d 34, 830 P.2d 318 (1992) that advice from a public official's attorney is meaningless for immunity purposes under 42 U.S.C. § 1983. The effect of the ruling is that, in determining damage liability under federal law, an official will be deemed to have "knowingly" violated the law

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[3] The court also ignored the fact that even a knowing violation of a state court order is not a violation of a clearly established *federal* right. Otherwise, a § 1983 claim against individual officers would arise out of every dispute over the interpretation and effect of a state court ruling.

even though that official was advised by his or her counsel that the action would not violate the law and, indeed, was *required* by valid law. Under this approach, such officials would be required to conduct their own legal analysis of their lawyer's advice and would need to be better versed in the law than their lawyers.

2. The Washington Supreme Court's Substantive Due Process Test For Land Use Legislation Conflicts With This Court's Precedents And Intrudes On The Legislative Power Of Local Government.

Seattle has indicated in its Petition for Writ of Certiorari how the Washington Supreme Court has, in effect, grafted an additional requirement on the test established by this Court for the purpose of determining whether substantive due process has been violated as a matter of federal law. *See* Petition for Writ of Certiorari, at 12-16. Here, the uncertainty resulting from the vague and inefficacious "unduly oppressive" standard, and the potential for havoc it portends for public policy making, should be considered.

Ironically, the Washington Supreme Court itself, in announcing the "unduly oppressive" test as the third element of a three part substantive due process test conceded that "the third inquiry will usually be the difficult and determinative one." *Presbytery of Seattle v. King County,* 114 Wash.2d 320, 331, 787 P.2d 907 (1990). It added that the standard "lodges wide discretion in the court . . . " *Presbytery,* 114 Wash. 2d at 331.

Indeed, the Washington Supreme Court may have understated the impact of this ill-defined standard. And it has taken little time for the impact to be felt. In August of this year the Washington Court of Appeals issued its opinion in *Powers v. Skagit County,* No. 27988-2-I, Slip Opinion (Wash. Ct. App. Aug. 24, 1992) in which a property owner alleged that the denial of a building permit for a residence to be located in a designated floodway violated substantive due process. Citing *Presbytery, Robinson* and *Sintra* the Court of Appeals reversed a trial court decision granting summary judgment in favor of Skagit County on the substantive due process issue. The plaintiff had admitted the first two prongs of the *Presbytery* substantive due process test were met, i.e., that the floodway regulations were aimed at achieving a legitimate public purpose and that the means were reasonably related to that purpose but argued that the trial court had not adequately considered the third (unduly oppressive) prong. Although Powers submitted only an affidavit that the Court of Appeals itself labeled "conclusory and without supporting facts" in asserting that the floodway regulation was unduly oppressive, the Court of Appeals found that a genuine issue regarding oppressiveness existed, requiring a trial on the merits. *Powers v. Skagit County,* No. 27988-2-I, Slip Opinion, at 8.

The unduly oppressive test as adopted and applied by the Washington courts raises a genuine specter of voluminous litigation in which the courts will review municipal legislation and land use decisions, conceded to be directed at legitimate public purposes and conceded to be related to such purposes, to determine if they nonetheless violate the amorphous "unduly oppressive" test. In

effect, this thrusts the judge into the seat of the legislator or councilmember in determining the propriety and efficacy of legislation. Judicial review under this standard is without rudder or compass. The court must look at the public interest and the private interest, consider all available alternatives, determine where to strike the balance between the two and then announce whether the legislative branch has demonstrated the requisite wisdom. As the City of Seattle has demonstrated in its Petition herein, this Court has long since rejected this "judiciary as legislature" approach. *See* Petition for Writ of Certiorari at 14. But the Washington Supreme Court is firmly committed to obsolete dictum in a 19th Century case of this Court, and will continue to apply it to invalidate rational police power legislation unless review is accepted by this court.

The precise effect of the approach adopted by the Washington Supreme Court is incalculable, but it is a prescription for a vast increase in litigation, and a guarantee that legislatures and local councils will act with timidity in dealing with issues of public concern, lest they subject governing entities to monetary liabilities they can ill-afford. The rights of property owners are adequately protected by the Takings Clause and by procedural due process in the vast majority of cases. Only in extreme cases of "invidious or irrational conduct" should substantive due process be invoked to review land use decisions. *Harding v. County of Door,* 870 F.2d 430, 431 (7th Cir. 1989). By subjecting all land use legislation to review under the "undue oppression" test, the Washington Court displaces this Court's takings jurisprudence. In the context of determining liability under § 1983, the state courts should

not be permitted to expand their review beyond the scope determined by the decisions of this Court and, in that process, effectively become quasi-legislatures of last resort.

CONCLUSION

The court is requested to grant review as requested in the Petition for Writ of Certiorari of the City of Seattle.

RESPECTFULLY SUBMITTED this 15th day of October, 1992.

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